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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 505

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE: SAVANNAH BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET. AL.,

Petitioners

vs.

HALDRED OVERSTREET

BRIEF FOR RESPONDENT

In Response To

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PAGE

INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statement	4
Reasons for Disallowance or Writ	8
Conclusion	14

Table of Cases and Authorities Cited

American Bank & C. Co. v. Federal Reserve Bank, 256 U. S. 350	11
Cable Co. v. Walker, 127 Ga. 65 (1) (56 S. E. 108)	13
Carlson v. California, 310 U. S. 106	11
Davis v. State, 114 Ga. 104 (39 S. E. 906)	9
Ellis v. Parks, 212 Ga. 540, 542 (93 S. E. 2d 708)	11
Georgia Code, Section 4-101	13
Glisson v. Burkhalter, 31 Ga. App. 365 (4), (120 S. E. 664)	13
Gompers v. Bucks Stove & R. Co., 221 U. S. 418	11
Haney School Furn. Co. v. Hightower Bapt. Inst., 113 Ga. 389 (2), (38 S. E. 761)	13
Hornsby v. Smith, 191 Ga. 491 (13 S. E. 2d, 20)	11
Horton v. Johnson, 192 Ga. 338, 346 (15 S. E. 2d 605)	9
Hubert v. Harpe, 181 Ga. 168, 169 (182 S. E. 167)	13
Huckaby v. Griffin Hosiery Mills, 205 Ga. 88, 91 (52 S. E. 2d 585)	9
McElroy v. State, 125 Ga. 240 (2) (54 S. E. 125)	9
Mechem, Outlines of Agency (3rd Ed.), P. 94, Sec. 152	13

Page

Milkwagon Dairies v. Meadowmoor Dairies, 312 U. S. 287 ..... 10, 11

Odum v. State, 183 Ga. 854 (190 S. E. 25) 9

Southern Motors of Savannah v. Krieger, 86 Ga. App. 574, (71 S. E. 2d 884) 13

U. S. v. Borden, 308 U. S. 188 10

Universalist Convention v. Guest, 179 Ga. 168 (2), (175 S. E. 466) 13

Woodruff v. Hughes, 2 Ga. App. 361 (58 S. E. 551) 9

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondent prays that a writ of certiorari be denied to review the judgment of the Supreme Court of Georgia entered on April 20, 1965, and partially rewritten on May 7, 1965 at the time of denial of a rehearing, in the above-entitled cause.

Jurisdiction

Respondent respectfuly submits that a review of the record in this case by this honorable court will reveal that no rights, privileges and immunities conferred by the constitution of the United States upon the petitioners have been violated or are even involved in this case, and that petitioners have no right, in law or equity, legally, morally, or otherwise, to invoke the jurisdiction of this honorable court.

Questions Presented

Respondent contends that there are no questions of constitutional rights in this case, in which petitioners have brought a petition for writ of certiorari to this honorable court, but submit that if any constitutional questions are to be considered they are not as expressed by petitioners, but should be as follows:

1. Has the Supreme Court of Georgia violated petitioners' right to freedom under the first and fourteenth amendments by affirming the decision of the Superior Court of Chatham County, Georgia, which found, upon ample and sufficient evidence, that petitioners, without any legal or moral justification, organized an unlawful conspiracy to picket respondent's place of business in order to punish him and put him out of business for allegedly striking a Negro boy, and pursuant to such conspiratorial and unlawful picketing, did harass and intimidate respondent's customers from entering respondent's store by creating an atmosphere of possible violence thereabout by having large numbers of pickets in and around said business, by stopping, inciting, and inflaming said customers against respondent by telling them false and misleading statements as to respondent's conduct, and by committing violence in and around said premises during the course of said unlawful and unjustified picketing.

2. Has petitioner National Association For The Advancement of Colored People, a New York Corporation, been deprived of its property without due process of law under the Fourteenth Amendment by being held liable in damages in this case for organizing, through its agents, W. W. Law and F. D. Jaudon, president and vice-president respectively of the Savannah Branch, National Association For The Advancement of Colored People, a mass meeting of the N.A.A.C.P. and of the Savannah Chapter of the N.A.A.C.P., by means of libelous circulars, at which meeting the conclusion was reached because of an allegation that respondent had struck a Negro boy, to picket respondent's place of business with the view of injuring and damaging his business by inducing customers and prospective customers to refrain from trading

with respondent, when it has been proved that the function of the N.A.A.C.P. is to give aid and assistance to people in the minority, meaning the Negro group in seeking their rights and protection under the constitution, and that the N.A.A.C.P. acts and operates in Georgia through the Savannah Chapter and other chapters, and when it has been proved that the Savannah Branch used the corporate name, N.A.A.C.P. and held itself out as representing the national corporation, the N.A.A.C.P. gave orders and counsel to its local representatives at annual conventions, that the locals were affiliated with the N.A.A.C.P. and under its corporate chapter, were units thereof; that one paying dues to the local N.A.A.C.P. also became a member of the N.A.A.C.P.; that members of the local were members of the N.A.A.C.P. and that a portion of the dues went to the N.A.A.C.P.; and that the locals are within the framework of the N.A.A.C.P. and are used in the furtherance of its business and interest.

3. Have the rights of petitioners under the First and Fourteenth Amendments to the United States Constitution to express themselves through peaceful picketing been abridged by the issuance of an injunction against unlawful and mass picketing of respondent's business premises for the purpose of injuring and damaging respondent's business, said form of picketing being accompanied by threats, intimidation, and coercion of respondent's customers and threatened violence and actual violence being practiced around such premises, and the only reason assigned for such form of picketing being that the respondent was accused of striking a Negro boy who had been employed by him?

4. Have the rights of petitioners under the First and Fourteenth Amendments to advise the public through picketing of a grievance they believed to be genuine but which had no legal or moral justification, been abridged by requiring the jury to adjudicate the legitimacy of such grievance as a prerequiiste to finding the picketing to be entitled to constitutional protection?

STATEMENT

A. Prior Proceedings

Respondent agrees with petitioners' statement of prior proceedings.

B. Evidence Presented

Petitioner Law is a resident of Savannah, Chatham County, Georgia, and president of petitioner Savannah Branch of the N.A.A.C.P. and the Georgia State Conferences of Branches N.A.A.C.P. both of which are unincorporated bodies under charters granted by petitioner N.A.A.C.P., a New York corporation (R 152-154). Petitioner Reverend F. D. Jaudon is First Vice-President of the Savannah Branch, N.A.A.C.P. (R 185). The function of the N.A.A.C.P. is to give aid and assistance to people in the minority, meaning the Negro group in seeking their rights and protection under the constitution (R 468-469). The N.A.A.C.P. acts and operates in Georgia through the Savannah Chapter and other chapters; gives orders and counsel to its local representatives at annual conventions (R 153); the local branch is affiliated with the N.A.A.C.P. and under its corporate charter is a unit thereof (R 152-155); one paying dues to the Savannah Branch also becomes a member of the N.A.A.C.P.; members of the Savannah Branch are members of the N.A.A.C.P.; a portion of the dues paid by members of the Savannah Branch goes to the N.A.A.C.P.; and the Savannah Branch is within the framework of the N.A.A.C.P. and is used in the furtherance of its business and interest (R 499-500). The respondent is the owner and operator of an open air market located in a racially mixed residential area in Savannah (R 386).

On May 30, 1962, Robert Lee Bolton, a Negro boy of fourteen and respondent's only Negro employee among seven employees, reported to the principal at his school and to his mother and aunt that he had just been physically assaulted by respondent who had accused him of stealing merchandise from the market and had slapped him beside the head and kicked him in the side. The boy further reported that respondent was intoxicated at the time of this incident (R 540-547).

A complaint of assault against respondent was immediately lodged with the Savannah police by the aunt of the Bolton boy (R 506). When the boy and a Negro police officer went to respondent's premises they found him asleep in a chair and the officer stated that he appeared to have been drinking but was not drunk (R 588). The police officer further testified that if a person takes one drink, he would say that such person is under the influence (R 591). Several of respondent's employees stated that respondent was not drinking and respondent testifying in his own behalf stated that he had not been drinking. The physician who examined the Bolton boy said that he found a bruised area on the side of his temple and that he complained of a soreness in the back and a stomach ache, and that because of the difficulty in trying to control the boy with sedation, he kept him under observation in the hospital for forty-eight hours (R 529-430). The Bolton boy admitted that he had gone by a basketball court and played basketball with other boys before going to work that day (R 551-554). The principal of the Bolton boy's school testified that he had seen similar injuries as a result of boys participating in a basketball game (R 580).

Bolton's mother testified that after she had taken her son to the hospital and returned home, she received several threatening telephone calls, that she reported these calls to the police, and then contacted petitioners' Savannah Branch, N.A.A.C.P. (R 503-508). Respondent had already been arrested and taken to jail hours prior to such alleged telephone calls.

Petitioner Law testified that as a result of the mother of Bolton calling upon the N.A.A.C.P. to assist her in defending or protecting her child he called a meeting of the N.A.A.C.P. for the next night at which time it was determined to organize a campaign to withhold patronage from respondent because of his assault on the young Negro boy (R 469, 155, 469-470). He also testified that such meeting was held pursuant to a circular distributed during the day time prior to the meeting which read as follows: "NAACP mass meeting tonight, Saint Phillips Monumental AME Church on Park

Avenue and Jefferson Street, Reverend F. D. Jaudon, pastor at 8 o'clock, protesting the beating of a fourteen year old Negro boy by the owner of Tropical Market, 1601 Montgomery Street, corner of 32nd Street. Come get the truth about the brutality that sent this boy to the hospital where he remains a patient. Come tonight, 8:00 P.M. (R 156). He further testified that the wording of said circular had his approval (R 156). He further testified he nor any members of the board of directors or any member or official of the local N.A.A.C.P. ever discusesd anything about the incident with respondent at anytime (R 158). He also testified that the church was filled with people attending the meeting but could only identify four by name (R 492-496). He further testified that in order to effectuate the picketing plan it was decided to place pickets on each corner of the streets surrounding respondent's market for the purpose of advising all potential customers that the pickets were not buying there because respondent had mistreated a Negro employee, and to request them also to withhold their patronage (R 165, 470-478). On the following day pickets were stationed in accordance with the plan and the picketing continued until June 22, 1962 when a temporary injunction prohibiting their presence was entered.

Officer A. A. Liabastre testified that he received numerous calls to the area of respondent's market due to a large number of people participating in the picketing, to such an extent that it blocked street and sidewalk traffic. He further testified that an agrement was finally reached whereby two pickets would be stationed at each corner surrounding respondent's market.

Petitioner Law was at the scene of picketing many times, sometimes for short periods of time and at others for a long period of time (R 164).

There was a great deal of testimony as to the acts of violence that occurred in and about the Tropical Market after the picketing commenced by petitioners on June 1, 1962. Mrs. Lillian Phillips, witness for respondent, testified that prior

to May 30, 1962 there had been no disturbances, acts of violence or any trouble in or about the Tropical Market. She further stated that after the pickets were placed on the outside, two colored men entered the store and asked for Mr. Overstreet, your respondent, stating that hey had come o get him and that during this time crowds of colored people surrounded respondent's market. The witness further stated that she lived in the vicinity of the Tropical Market and prior to the picketing she was able to walk to work by herself but after the pickets were set up it was necessary for her husband or some other man to walk her to work. The reason she gave for this action was the crowds of Negroes on the corners adjacent to the Tropical Market would say to her as she went by "well, today is a fine day to get her" or "let's get her" or "why don't we get her today." On several occasions it was necessary for her to walk down the middle of the street immediately in front of respondent's market in order for her to get to the store (R 190-191). The pickets would yell or scream at potential customers entering the respondent's market that they, the customers, were not being fair to their color and that they should trade across the street at another market because respondent had beaten the colored boy (R 188-192).

Mrs. Phillips further testified that the picketers had cursed her and also stated that they were going to molest her but she did not use these words during the trial but indicated that profanity was used to suggest what they were going to do. Customers that came into the Tropical Market and made purchases would soon return after being accosted by the pickets on the outside and request their money back without reason, cause or justification and return the mechandise (R 192). Mrs. Phillips also identified one, Johnny Drayton, as being one of the picketers and also one of the ones that had made threats to her (R 194-198).

Mrs. Wilma Love, witness for respondent, stated that on several occasions she had heard threats made to potential customers of respondent's market and that she herself had been threatened by the pickets on one occasion when she

entered the market to do her shopping (R 230). Mrs. Love further stated that after the picketing had started and while she was on her back porch which adjoined respondent's market she heard a pistol shot from the direction of the area where the pickets were stationed (R 235-236). Bricks and sticks were thrown at respondent's market and upon the roof of the building (R 230-238, 248-252).

Mrs. Allie V. Cox testified that the person that had made the threat of assaulting her and Mrs. Phillips and cursing them was among the picketers and she had seen him among the picketers on several occasions. She stated further that during the time of the picketing she received several calls while on duty at respondent's market to the effect that there was a bomb planted within the market (R 228-292).

Hamp Wyre, accountant for respondent, testified to the gross income and net income for respondent's market prior to the picketing and also compared these figures with the gross income and net income subsequent to the commencement of the picketing which clearly showed the tremendous decrease in respondent's income due to the boycott by petitioners (R 440-443).

REASONS FOR DISALLOWANCE OF WRIT

1. The petitioners in this case had no lawful or constitutional right to form a conspiracy to violate respondent's right to operate his business, where he was not infringing on any of their rights, or to force him out of business as punishment for allegedly committing a misdemeanor upon one of his employees or prevent or attempt to prevent his employees from continuing in his employ by intimidation, coercion, force or violence.

This case does not involve a controversy between the races. The relation of respondent and the Negroes of the community in which his store was located were obviously friendly and cordial, for his business depended upon their friendship and good will. He had both, as evidenced by the fact that more than two-thirds of his customers were Negroes (R. 188).

He had built this good will over a number of years which must have required his good will toward them. The single incident which gave rise to their meeting and the subsequent picketing, whether caused by respondent firing the boy for stealing or beating him—whichever is true—and the evidence as to what occurred is inconclusive, would not justify the conclusion that the boy's race had anything to do with it. There is no evidence that what happened occurred because he was a Negro. It might as well have happened to a white boy. This is obviously not a case of peaceful picketing to protest racial discrimination.

The petitioners organized a conspiracy to wrongfully, unlawfully, and maliciously injure and damage respondent's business and to put him out of business. Such conspiracy was formed at a mass meeting of the NAACP called by the petitioners Law and Jaudon, and pursuant thereto picketing began the next day and continued until stopped by the court injunction. There was violence, threats against respondent and his employees, bricks and rocks thrown into and on top of the respondent's store, mass picketing, harassment and intimidation of customers and employees, coming from the mass of Negroes picketing the place, some of whom were admittedly those representing the petitioners and placed there by petitioner Law.

"The law recognizes the intrinsic difficulty of proving a conspiracy. The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." **Woodruff V. Hughes,** 2 Ga. app. 361 (58 S. E. 551); **Horton v. Johnson,** 192 Ga. 338, 346 (15 S. E. 2nd 605).

"A conspiracy or common intent may be shown to have existed between the parties by proof of acts and conduct, **Davis v. State,** 114 Ga. 104 (39 S. E. 906); **Odum v. State,** 183 Ga. 854 (190 S. E. 25); and it may be shown by circumstantial or direct evidence. **McElroy v. State,** 125 Ga. 240 (2) (54 S. E. 125)." **Huckaby v. Griffin Hosiery Mills,** 205 Ga. 88, 91 (52 S. E. 2nd 585).

Applying the above principles in this case, the evidence would authorize the jury to find that such violent and unlawful picketing was the proximate result of the conspiracy without specific proof that one or more of the pickets placed thereby petitioner Law were the ones who threw the rock, or performed other specific acts of violence, intimidation, etc.

It was said in **U. S. v. Borden**, 308 U. S. 188:

> The decision of the State Court that the alleged "peaceful picketing" was unlawful per se and inseparable from the unlawful conspiracy and other illegal acts of the petitioners in furtherance thereof, is not reviewable.

An important principle of constitutional law was enunciated in **Milkwagon Dairies v. Meadowmoor Dairies**, 312 U. S. 287, which except for the existence of an industrial dispute in said case is applicable to the situation in this case:

> "These acts of violence are neither episodic nor isolated. Judges need not be innocent of the actualities of such an industrial conflict as this record discloses as to find in the constitution denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the constitution. Certainly a state is not confined by the constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of discretion open to the national labor relations board. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondent superior."

It cannot be logically contended or argued that the purpose of the picketing in this case had any basis for justification whatsoever, either legal, equitable, moral, or otherwise. This

court recognized in **Gompers v. Bucks Stove & R. Co.**, 221 U. S. 418, that "the constitutional right of free speech cannot be invoked as a cloak for means used in effecting an unlawful interference with the right to carry on business."

> The constitutional right of free speech does not preclude an injunction against picketing in furtherance of an unlawful purpose, that is, one contrary to the public policy or statutory law of the particular jurisdiction. **Milkwagon Drivers v. Meadowmoor Dairies, Supra.**

Applicable here is the following from **Ellis v. Parks**, 212 Ga. 540, 542 (93 S. E. 2d 708:

> The judicial theory that peaceful picketing is a form of free speech, as announced in **Carlson v. California**, 310 U. S. 106 60 Sup. Ct. 746, 84 L. Ed. 1104), which is protected by the constitutions, both Federal and State (code ann. sections 1-801, 2-115), cannot be stretched to malevolent picketing for the purpose of injuring the employer and aiding an unlawful strike. Both the Supreme Court of Georgia and the Supreme Court of the United States have held that a person can not employ lawful acts for spite and solely for the purpose of injuring another, and that such malicious purpose renders the acts unlawful. **Hornsby v. Smith**, 191 Ga. 491 (13 S. E. 2d, 133, A.L.R. 684); **American Bank & C. Co. v. Federal Reserve Bank**, 256 U. S. 350 (41 Sup. Ct. 499, 65, L. Ed. 983, 25 A.L.R. 971).

Although constitutitonal issues are urged by petitioners in their petition for writ of certiorari, respondent cannot accept such assertions as predicated upon any basis of fact. This is simply a suit for compensatory and punitive damages brought by respondent for recovery of his losses sustained as the result of the malicious and unlawful conspiracy to put him out of business and the unlawful picketing carried on pursuant thereto. The compensatory damages were adequately proved and the punitive damages were fully justified by the aggravated and malicious acts.

2. It is petitioners' contention that the finding of liability as to the NAACP, a New York Corporation, raises separate constitutional issues which require scrutiny by this court. However, this contention is refuted by the evidence presented in the case. The evidence shows that the petitioner Law was president of both the Savannah Branch and of the Georgia State Conference of Branches of the NAACP, a New York Corporation (R-152). Acting in that capacity he, by means of circulars, called a mass meeting of the NAACP and of the Savannah Chapter of the NAACP, in which meeting he and Jaudon participated and led the group in reaching the conclusion that the NAACP would picket the respondent's place of business with the view of injuring and damaging his business by inducing customers and prospective customers to refrain from trading with him (R 163-164); and pursuant thereto, Law selected pickets, placed them at various places around respondent's place of business, picketed himself, and generally directed the picketing (R-164). "The function of the NAACP," according to Law, "is to give aid and assistance to people in the minority group, meaning the Negro group in seeking their rights and protection under the Constitution (R-469)."

The NAACP Corporation of New York acts and operates in Georgia through the Savannah Chapter and other Chapters (R-153). The petition was served upon the NAACP Corporation and the Savannah Branch, and the Georgia State Conference of Branches of the NAACP by serving Law, as their agent. No plea to the jurisdiction or traverse of service was filed by any petitioner for certiorari, but each submitted to the jurisdiction of the court by filing answers, not made subject to their general demurrers, which alleged that the respondent here did not state a cause of action against them.

The Savannah Branch used the Corporate name, NAACP and held itself out as representing the National Corporation (R-156). The National Corporation gave orders and counsel to its local representatives at annual conventions (R-153); the locals were affiliated with the National Organizations, and under its Corporate Charter, were units thereof (R-153); one

paying dues to the local NAACP also became a member of the National NAACP; members of the local were members of the National NAACP and a portion of the dues went to the NAACP Corporation (R-499-500). These facts evidence that the locals are within the framework of the national organization and are used in furtherance of the latter's business and interest (R-499-500). "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." **Ga. Code Sec. 4-101.** A contract or an express agency agreement is not necessary to establish the relation. **Hubert v. Harpe,** 181 Ga. 168, 169 (182 S. E. 167). "The fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties . . ." **Cable Co. v. Walker,** 127 Ga. 65 (1) (56 S. E. 108), and "a claim of agency may be established by circumstantial evidence . . ." **Universalist Convention v. Guest,** 179 Ga. 168 (2) (175 S. E. 466).

The National Corporation never at any time disavowed the agency of Law, Jaudon, or the Savannah Chapter in acting for it in this matter. It was notified of the action by Law. It came into court and defended the case on its merits, contending that a cause of action was not alleged or proven against it.

If petitioner Law originally acted without authority and assumed to act for the National Corporation without authority, they had the option to repudiate or ratify the act, but they were required to do one or the other. And where, as here, they never repudiated the act, they are deemed to have affirmed it. See **Mechem, Outlines of Agency** (3rd Ed.), p. 94, sec. 152; **Southern Motors of Savannah v. Krieger,** 86 Ga. App. 574 (71 S. E. 2d 884); **Hany School Furn. Co. v. Hightower Bapt. Inst.,** 113 Ga. 389 (2) (38 S. E. 761); **Glisson v. Burkhalter,** 31 Ga. App. 365 (4) (120 S. E. 664).

It is respondent's contention that the record supports the conclusion that petitioner Law acted as agent of the NAACP's Savannah Chapter, and of the NAACP New York Corporation, and within the scope of his authority in calling the mass meeting, holding the meeting, in concluding to picket respondent's store and in picketing it, causing injury and damage thereto.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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